

**REPORT TO THE GOVERNOR**  
**PURSUANT TO EXECUTIVE ORDER NO. 97**  
**PART I**  
**October 1, 1993**

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Executive Order No. 97, charged the Governor's Chief Counsel with the responsibility for conducting a comprehensive review of the State's regulatory system and making recommendations for improvement on or before October 1, 1993.

This initial report of the Chief Counsel and Summary of Recommendations by the Regulatory Reform Advisory Panel is the first of a two-part report to the Governor. Part II, containing detailed summary of the Advisory Panel deliberations, together with additional recommendations for consideration, will be transmitted within the coming week.

Executive Order No. 97 was issued in recognition that an ever-growing body of regulation imposed upon the public, a regulatory scheme which too often was confusing, impractical, or conflicting. Moreover, the process by which such rules were adopted or maintained often did not afford the public appropriate opportunity for participation nor impose appropriate accountability for Executive Branch agencies, including department heads and staff. Quite simply, the obligations and opportunities which are an inherent part of our rulemaking system historically have not been universally recognized through New Jersey's Executive Branch of government. Immediately following the issuance of Executive Order No. 97, the active participation of all Executive Branch departments

and agencies was enlisted. Each department and agency was asked to commence a process to identify existing rules which are candidates for repeal or consolidation. That process is ongoing and I anticipate that a significant body of candidates for repeal will be assembled during the coming months. Additionally, each department and agency was asked to identify current initiatives for improving the rulemaking process. As anticipated, the survey disclosed a number of activities which, although innovative and successful, did not always receive public recognition of their existence or success.

Part II of this report will detail many of the initiatives now under way in various agencies and departments. These innovative approaches to rulemaking can be categorized in a number of broad categories: internal rule review, public outreach, language simplification, and streamlining. One example of such an initiative is the Department of Education's recent Code Convention which involved the general public and education community in a day-long dialogue to discuss ways to simplify Administrative Code language. The initial work of this Convention, which was held on September 21, 1993, is continuing through a Code Review committee, the final product of which will be provided to the State Board of Education. Another example is illustrated by the Department of Banking's annual "Day with the Commissioner," which provides an opportunity for the regulated community to speak directly to the Department's chief policymaker. The Department of Human Services has established an Operation Policy to Rules, which involves an advisory board comprised of more than 60 representatives of public and private

groups to review current unpublished guidelines and procedures (the "hidden bureaucracy") to determine which procedures should be codified as formal rules. In the past, we have discussed the initiatives of the Department of Environmental Protection and Energy which have included a number of pre-proposal and formal public hearing dialogue formats, involving active participation by the Commissioner or other senior policymakers as presiding officer.

Another activity which was initiated by Executive Order No. 97 is an ongoing government-wide review of current regulations, which is intended to "weed out" illogical, conflicting, or outdated rules. As previously mentioned, a comprehensive initial listing of candidates for repeal or consolidation will be provided within Part II of this report. At this time, I would like to highlight two examples which were provided by the Department of Law and Public Safety, which illustrate an apparent overreach by certain regulations.

The first, N.J.A.C. 13:47K-4.10(b), states that when a carton containing twelve eggs is divided in half by a retail purchaser, the required quantity declaration shall be so positioned that the declaration will be "destroyed" or rendered unreadable when the carton is divided. In other words, apparently, consumers need help to make sure that they don't confuse six eggs with twelve eggs. The provisions of N.J.A.C. 13:47K-2.3, 2.8, and 2.9, each separately delineate nearly identical requirements for the identification of the quantity of paper towels, facial tissues and toilet paper

contained in their respective packaging. This appears to be an example of the potential to consolidate certain highly specific but redundant rules into a single generic rule with broader applicability.

The significant achievements of the past month are reflected in the recommendations of the Advisory Panel which was convened to assist the Chief Counsel in reviewing the rulemaking and making recommendations to the Governor consistent with the charge of Executive Order No. 97. The Advisory Panel was comprised of members of the Governor's Cabinet, leaders from the business, industry, public interest advocacy, and legal communities, together with key agency staff. A complete list of the Advisory Panel participants immediately precedes the text of this report.

The work of the Advisory Panel was built upon the underlying premises of Executive Order No. 97; namely, that no single initiative or "silver bullet" would address the problems reflected in New Jersey's rulemaking process or which are inherent to any regulatory system. Rather, it would be necessary to identify, based upon demonstrated successes and failures, examples of fundamental approaches and values which are the building blocks of a successful rulemaking process. In furtherance of that objective, the Advisory Panel convened and met on a regular, weekly basis commencing August 31, 1993 through September 30, 1993. In preparation for its work and deliberation, the Advisory Panel reviewed the previous SCORE report together with a 1993 report developed by the Office of Administrative Law, which addressed the current rulemaking process, existing opportunities for public involvement, observations of the



current process based on rulemaking data, and suggested approaches for improvement. The methodology for overall analysis was based upon a rulemaking model which divided the process into five principal components: (1) rule development, (2) pre-proposal, (3) formal proposal/public comment, (4) rule adoption, and (5) implementation/oversight/sunset.

While the work of the Advisory Panel concentrated on improving the rulemaking process, a fundamental conclusion reached by the Advisory Panel was that, that to be effective, a rulemaking process must focus as much on the post-adoption implementation and enforcement of a rule as well as the manner and system by which a rule is adopted. While the five weekly meetings of the Advisory Panel concentrated on improving the rulemaking and adoption process, there was unanimous support for the principle that improvements, government-wide, concerning the implementation of rules are critical to the effectiveness of and public support for a successful regulatory system. To that end, it is the recommendation of the Advisory Panel that it be authorized and charged with a continuing assignment to analyze issues concerning the adequacy of rule implementation and report and make recommendations to the Governor in that regard.

The Advisory Panel accepted as its immediate charge responsibility for the review of the current rulemaking process and the identification of specific recommendations to the Governor which could be implemented immediately with the intended impact of making

demonstrable systemic improvements to New Jersey's regulatory framework. During the course of its deliberations, the Advisory Panel identified a number of specific problems and shortcomings in New Jersey's current rulemaking process.

As a general rule, the process of adopting regulations does not meet the potential for providing a meaningful opportunity for the public to participate in rulemaking and have an impact upon New Jersey's regulatory system.

The lack of public participation is due to many factors, including a general inadequacy of outreach or notice to the public concerning the nature of the proposed rule and the opportunity for comment; the structure and format of public hearings or public comment processes; and the methods of dissemination of and access to information regarding the basis upon which a regulation is adopted by an administrative agency.

The mechanism of the petition for rulemaking, which provides a means for interested persons to initiate a rulemaking, is rarely used and, when it is, generally departments have been unresponsive to such initiatives.

Rule negotiation, a mechanism for cooperatively arriving at formal rule proposals and adoptions, has never been formally used in New Jersey.



Few agencies employ the device of publishing rulemaking calendars and agendas to assist the public in being informed of rulemaking activity.

Notice of rule expiration and readoption under Executive Order No. 66 (Byrne), which imposes a five-year sunset on all rules adopted or amended subsequent to its issuance in 1978, has not provided a basis for discriminating deliberation by agencies as to the appropriateness of the continuation of a regulation neither has the Executive Order prompted significant public participation in the readoption process.

Rule summaries, economic and social impact statements, and regulatory flexibility analyses, all of which are required elements of a formal rule proposal, are frequently insufficient, overly-general, or conclusory.

From the specific criticisms and observations of the current and historic rulemaking process, a central conclusion can be reached: despite the importance and necessity of much of the New Jersey regulatory framework, our State's rulemaking process generally represents a lost opportunity to effectively involve the public in the formation of public policies and requirements which affect their day-to-day lives. As a consequence, it should be no surprise that there is a widespread public alienation from the rulemaking process which is reflected by broad-based criticisms and a lack of public support.

During its deliberations, the Advisory Panel articulated a number of central themes for any future initiatives to enhance New Jersey's regulatory system. These include the need to improve public outreach and opportunities for meaningful public participation in rulemaking, the need for greater agency accountability in rulemaking, and the need to develop systemic mechanisms for gubernatorial involvement in the rulemaking process to ensure that a Governor's fundamental public policies and values are reflected in the process of adopting as well as in the substance of regulations. At the heart of these themes is the concept of accountability. Through our discussions, the Advisory Panel learned that when rulemaking has worked best it is because the agency head has become directly involved in the development, adoption, and implementation of a regulation. To be successful, agency heads must be an integral and active part of rulemaking from development of the proposal to implementation. Moreover, agency heads must establish mechanisms which provide them with the opportunity and responsibility for making crucial policy decisions which are reflected in a regulation's requirements and implementation.

An axiom for the Advisory Panel's discussions was that any improvements in the rulemaking process must be achieved without the creation of new bureaucracies, oversight agencies, or regulatory "gatekeepers." The pursuit of that policy underscored the inherent importance of viewing the regulatory process as a logical and necessary extension of the legislation which is both the basis for and limitations of any rule or regulation.

This dynamic legislative-regulatory relationship was discussed by the Advisory Panel and was the topic of separate conversation between myself and Senator John Bennett, Chairman of the Senate Legislative Oversight Committee. I anticipate and look forward to the opportunity for the Advisory Panel and Senator Bennett's committee to work collaboratively during the course of future meetings.

Recognition of the continuum of responsibility and activity represented by the legislative-regulatory process underscored the need, in the view of the Advisory Panel, to increase the role of the Governor's Office in the rulemaking process. Clearly, a Governor's concern regarding public policy development does not end with the enactment of a particular piece of legislation. In fact, a Governor's responsibility regarding implementation and execution of the laws is carried out in many instances through adopted rules and regulations.

It was the unanimous recommendation of the Advisory Panel that such ongoing involvement in the rulemaking process be carried out by the Office of Governor's Counsel through collaboration with agencies during the course of the development or adoption of particular rules, most notably any regulations which are adopted to implement new legislation. While there was universal recognition, underscored by myself, that the specific substance and technical requirements of any regulation must be left to the special expertise of the adopting agency, providing for active collaboration between the agency and the Governor's Office will allow a Governor to ensure that the

process and public policy underpinnings of the regulation comport with both legislative and gubernatorial intent. Any such involvement by the Governor's Office is not intended to erect bureaucratic hurdles, but rather to provide a means by which a Governor will be able to consistently gauge how well specific agencies are doing in their efforts to implement the core policies and values which are intended to be reflected in the regulatory system. As indicated, such a role stems from and complements the traditional participation of the Counsel's Office in agency legislative initiatives.

Notwithstanding any future role for the Governor's Office in the rulemaking process, there is also a unanimous recognition that the ultimate "gatekeeper" for rulemaking activity is the head of each rulemaking agency. It is through that individual that decisions must and should be made regarding the adequacy or appropriateness of new or existing regulations. It is also through the agency head that the values which are an inherent part of any successful rule regulatory system will be infused throughout the Executive Branch.

The Advisory Panel also recognized that while agencies are eliminating, consolidating, or rationalizing their current rules, they must also attend to unpublished internal rules, procedures and guidelines which constitute the "hidden bureaucracy." These undisclosed regulations can affect the public even more than formal published rules. In reviewing these internal unpublished rules, agencies will undoubtedly conclude that some new rules must be adopted to bring to public notice aspects of regulation which have

long affected public activities but which have escaped broad-based scrutiny or comment. An agencywide systematic review of internal operating procedures and guidelines, with public involvement, has never been taken throughout the Executive Branch. The Advisory Panel recommends that the review and analysis initiated by Executive Order No. 97 be continued with the specific requirement that each agency formally establish a procedure, including public participation, for such a review.

The burden of regulation has not grown because State agencies are not well-intended, but rather, because they have not always recognized the opportunities and obligations of rulemaking. To achieve fundamental change in the rulemaking culture, the Executive Branch must adopt new, goal-oriented problem-solving values. This evolution in attitude will be cultivated through mechanisms designed to increase public involvement in the rulemaking process from the earliest stages of rule development. Public participation, moreover, must continue through to rule implementation to ensure agencies remain accountable long after new rules become operational and enforcement begins. Empowerment of the public through greater inclusion and involvement in the rulemaking process will be an irresistible engine for systemic attitudinal change throughout State government.

Drawing from all of these sources, a comprehensive set of recommendations for improving the rulemaking process was developed. A summary of the key recommendations is set forth for your consideration. Chief among these is a call for the Advisory Panel to be permitted to continue work on recommendations to make government more responsive, accountable and consistent in the implementation and enforcement of regulations.

1. The Advisory Panel should continue to work in conjunction with the Chief Counsel to provide recommendations for assuring agency accountability and public participation in rule implementation and enforcement.
2. Require agency heads to chair public hearings regarding significant regulatory initiatives, such as major rule adoptions implementing new legislation or re-adoption of significant rules.
3. Extend Executive Order No. 66 (Byrne, 1978) to all previously grandfathered rules that currently have no expiration date.
4. The Office of Counsel to the Governor should assume a role in collaborating during rulemaking activity to assure that there has been adequate public outreach and interdepartmental coordination in rules subject to



expiration under Executive Order No. 66, rulemaking mandated by new legislation or petition, and key agency policy initiatives. In such cases, agencies should file with the Office of Counsel to the Governor their specific plans to develop and adopt such rules.

5. Agency heads should immediately create a code review committee to be comprised of policymakers, technical staff, public and regulated communities to identify problem areas for further review and to make recommendations for "weeding out" rules, and to make an initial progress report to the Governor by January 7, 1994, and final report by September 30, 1994.
6. Agency heads should design a process that involves the public to identify unpublished internal guidelines and procedures which are appropriate for rulemaking to bring to light the "secret bureaucracy," and should report to the Governor on or before December 1, 1993 on the process to be used, and timetable for completion.
7. Agency heads should establish internal rulemaking teams for significant rule development and an internal rule development process which requires affirmative approval by the agency head before work can proceed and which includes periodic review of work progress.

8. In all major policy initiatives, and whenever new legislation or court order mandate rulemaking, within 30 days of enactment or decision, agencies should develop and file with the Office of Administrative Law and the Office of the Governor's Counsel, a rulemaking plan with particular attention to pre-proposal outreach, and interagency coordination.
9. Agencies should develop a plan for pre-proposal outreach when upon submission of a formal rule proposal, the Office of Administrative Law determines the agency has not provided adequate detail in the summary, social impact, economic impact or regulatory flexibility statements, or when the proposal would have an impact on local government.
10. Agencies should include in rule proposals a disclosure of pre-proposal consultation efforts with other agencies and with the public, which should include the Office of Management and Budget to assess the impact on the State Treasury. The disclosure should include an express statement that there is no inconsistency with the regulatory programs of other agencies, how the rule is to be applied, and how it will achieve its intended goal.

11. In providing direct notice of rulemaking activity to interested persons, agencies should include either the entire text of the rule proposal or a full description of the rulemaking proposed, both of which should be written in plain language. Notice should be achieved through actual publication and not merely through the issuance of a press release.
12. Agencies should include in the Notice of Rule Adoption or any notice of pre-proposal activity:
  - a) The rationale for the alternative chosen and for major options rejected, including the option of maintaining the status quo.
  - b) The express statutory basis for each section of the rule.
  - c) Particularized responses for all criticisms or recommendations contained in comments submitted. Comments should receive individual acknowledgement.
  - d) The names of members of any oversight advisory committee, and the name and telephone number of the agency employee who will be responsible for responding to complaints.

13. Agencies should review all current rules 18 months before expiration and report to the Governor's Counsel and to the OAL at least 12 months prior to rule expiration pursuant to Executive Order No. 66 concerning review activity and plans for readoption, amendment and public outreach.
14. Permit the rule expiration date pursuant to Executive Order No. 66 to be tolled if a new rule proposal or re-proposal is published before the expiration date of the current rule, or before a time certain (i.e., 180 days), to avoid an agency rush to re-adopt, foreclosing adequate opportunity for public participation.